

IN THE  
SUPREME COURT OF MISSOURI

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No. SC 90647

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MISSOURI TITLE LOANS, INC.,

*Appellant,*

v.

BEVERLY BREWER,

*Respondent.*

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BRIEF OF MISSOURI AUTOMOBILE DEALERS' ASSOCIATION  
AS AMICUS CURIAE

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## INTEREST OF AMICUS

The Missouri Automobile Dealers Association (“MADA”) appears herein pursuant to Rule 84.05(f) (2) and (3) for the purpose of addressing serious policy implications inherent in this Court’s reexamination, on remand from the United States Supreme Court, of the issues presented in this matter as they concern the ability of commercial entities, and their customers, to waive via contract the right to address consumer disputes through the procedural mechanism of *class* arbitration. As discussed more thoroughly *infra*, MADA and its members have a unique interest in the issues presented herein that will not be specifically addressed by the primary parties of record.

MADA represents the interests of its members, consisting of approximately 382 franchise new motor vehicle dealers operating in the state of Missouri, as well as over 200 “associate” members in the used motor vehicle, powersport, and boat industries. MADA is a Missouri non-profit corporation in good standing, Charter No. N00040236.

MADA has an interest in protecting the freedom of its members, and the freedom of its members’ customers, to enter into contracts containing terms which affect the parties’ right to arbitrate potential disputes in a manner which is both compliant with the Federal Arbitration Act (“FAA”) **and** which incorporates fully the intentions of the parties. This freedom must include, pursuant to the recent holding of the Supreme Court of the United States in the case of *AT&T Mobility LLC v. Concepcion*, 2011 WL 1561956 (U.S. 2011) (Slip Op. No. 09-893) (*AT&T*) the ability

to contractually waive class arbitration as a means of addressing consumer/merchant disputes<sup>1</sup>. This is a matter of crucial interest to MADA and its members, a majority of whom currently or will in the future utilize contractual arbitration provisions in their consumer contracts.

This Court's previous holding in this case greatly weakens, if not eliminates, the ability of Missouri motor vehicle dealers to include enforceable "class arbitration waiver" provisions in contracts they execute with their customers. While MADA strongly supports the availability of bilateral arbitration, subject to agreement of the parties as a means of addressing consumer disputes, and thus strongly supports the objectives and purposes of the FAA, MADA urges this Court to enter an opinion in this case which is consistent with the opinion of the Supreme Court of the United States in *AT&T*. Such an opinion would not only uphold the objectives of the FAA, but would also allow the Missouri dealer industry to avoid the potential harms more fully described below.

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<sup>1</sup> As noted by Justice Price in his Dissent in this case, ". . . Missouri law recognizes the great value of freedom of contract, where parties may bargain both price and terms to their mutual benefit and then are held accountable for the agreement made." *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo. banc 2010).

## FACTS

In lieu of a separate recitation, and because *Amicus* MADA appears herein for the purpose of addressing broad policy issues rather than the specific facts of the underlying case, MADA hereby defers to the factual statements presented by the primary parties-in-interest.

## ARGUMENT

**In order to further the objectives of Congress via its passage of the Federal Arbitration Act, this Court must, following the Order of the Supreme Court of the United States which vacated and remanded the original holding in this case in light of the holding in *AT&T Mobility LLC v. Concepcion*, enter an opinion consistent with the holding reached by the U.S. Supreme Court in *AT&T* regarding the ability of commercial parties to waive, via contract, their right to pursue class arbitration as a means of resolving potential disputes.**

### *1. Background/Interest of Amicus*

The Missouri Automobile Dealers Association was formed in the 1930's (originally as a "benevolent" corporation under then-existing statutes) in order to represent and coordinate the interests of Missouri's retail franchise new motor vehicle dealers. Over the years, MADA's role has expanded to include associate memberships for used motor vehicle, boat, and powersport (i.e. motorcycles, all-terrain vehicles, etc.) dealers, as well as the provision of numerous services to

members to assist them in conducting business in the retail and wholesale motor vehicle sales business.

MADA is dedicated to acquiring, preserving, and disseminating information to all branches of the automotive industry. MADA engages in non-profit educational activities as a commercial and trade association addressing the sale, marketing, promotion and delivery, repair and use of motor vehicles. MADA promotes the spirit of cooperation among its members and cooperating with the National Automobile Dealers Association and other organizations; and engages in activities which help to maintain the public's confidence and goodwill, including educational activities concerning the purchase and use of motor vehicles.

MADA takes an active interest in its members' welfare and success, and is compelled thereby to offer the following suggestions in support of its position in this matter.

## **2. This Court's (Vacated) Opinion Cannot Be Reconciled with AT&T**

This Court's previous holding in this case addressed a class arbitration waiver provision ("class waiver") found in a consumer loan contract entered into between Missouri Title Loans, Inc. and Ms. Brewer. After a thorough analysis of the class waiver at issue and relevant provisions of the FAA, and Missouri common law relating to the validity of contracts generally, this Court's majority opinion affirmed the trial court's determination invalidating the disputed class waiver on the basis of it being "unconscionable," and specifically determined that:

- 1) The class waiver at issue was procedurally unconscionable;

- 2) The class waiver at issue was substantively unconscionable; and thus,
- 3) The class waiver at issue was not enforceable.

*See Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010).

This Court's opinion was handed down on or about August 31, 2010. On April 27 of this year, the Supreme Court of the United States handed down its Opinion in *AT&T*, in which, reviewing substantially identical material facts and issues as were presented for this Court's review in this case, a majority of that Court determined, in summary, that the "Discover Bank" rule<sup>2</sup> could not stand because it constituted "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was thus preempted by the FAA. *See AT&T Mobility LLC v. Concepcion*, 2011 WL 1561956 (U.S. 2011) (Slip Op. No. 09-893).

As noted in *AT&T*, while section 2 of the FAA allows non-enforcement of arbitration clauses on the basis of "generally applicable contract defenses," it does **not** preserve state law rules which interfere with execution of the FAA's primary objectives. In essence, California's *Discover Bank* rule interfered with the FAA, and

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<sup>2</sup> *Discover Bank v. Superior Court*, 36 Cal 4<sup>th</sup> 148, 113 P. 3d 1100 (2005). The "Discover Bank" rule was so named because of the holding reached by the Supreme Court of California in that case which, for all purposes relevant herein, was a holding substantially identical to the holding reached by this Court in *Brewer* concerning the key issues involving unconscionability of class arbitration waivers in consumer contracts.

was thus preempted by it, because its application had the effect of **mandating** the availability of class-wide arbitration. *See AT&T*, Slip. Op. at pp. 9 -14. The Court in *AT&T* stressed that the “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” Slip. Op. at p. 9 (emphasis added). The Court then concluded that California’s *Discover Bank* rule (again, which is substantially identical to this Court’s majority holding in this case) “interferes with arbitration” because it allowed “any party to a consumer contract to demand [class wide arbitration] *ex post*.” Slip Op. at p. 12.

### **3. Class Arbitration of Particular Concern to Missouri Auto Dealerships**

Perhaps most relevant for purposes of this *Amicus* Brief are the underlying “policy” grounds put forth by Justice Scalia in support of the majority’s holding in *AT&T*. In short, when considering the potential for class arbitration generally, the “changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental.” Slip. Op. at p. 13, *citing Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, 559 U.S. \_\_\_, \_\_\_, (2010) (Slip Op. at 17). Expounding on this, Justice Scalia wrote for the majority as follows:

**This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally**

**knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. *The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.***

Slip Op. at 13 (emphasis added). The majority Opinion then proceeds to note three specific policy concerns which highlight *Discover Bank's* fundamental inconsistency with the FAA; *these concerns are of particular importance, concern, and relevance to the interests of Missouri's retail motor vehicle dealerships which make up MADA's membership.*

“First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process *slower, more costly, and more likely to generate procedural morass than final judgment.*” Slip Op. at 14 (emphasis added). To essentially *mandate* the availability of class-wide *arbitration* opens up an entirely new avenue of “procedural morass”, and hence excessive and unnecessary expense, for small businesses such as the bulk of Missouri’s motor vehicle dealerships.

“Second, class arbitration *requires* procedural formality . . . for a class-action money judgment to bind absentee [parties] in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class . . . [a]t least this amount of process would presumably be required absent parties to be bound by the results of [class-wide] arbitration.” Slip Op. at 15 (Court’s emphasis). In

addition, the U.S. Supreme Court’s opinion also expressed great concern over the competence of an arbitrator to resolve complex procedural and certification questions necessary for maintenance of a class-wide arbitration proceeding. *Id.*<sup>3</sup>.

“Third, *class arbitration greatly increases risks to defendants*. Informal procedures do have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding [court litigation]. *But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims . . . arbitration is poorly suited to these higher stakes.*” Slip Op. at 16 (emphasis added). Obviously, the spectre of such a situation weighs heavily upon the minds of the many small business owners that collectively make up Missouri’s motor vehicle sales industry. It is this very prospect – the untenable choice of either “throwing the dice” in class arbitration, thereby running the risk of a potentially business-killing liability determination that is not subject to meaningful judicial review, or, yielding to the fear imposed by that risk and settling a very large number of potentially frivolous claims, for a still-damaging, still-

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<sup>3</sup> “We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.”

substantial but “survivable” payout – that haunts Missouri’s motor vehicle dealerships. This prospect alone requires that the ability to contractually waive class arbitration be restored to Missouri dealerships and other small businesses.

In fact, each of the three enumerated policy grounds cited by the Majority in *AT&T* have particular relevance to MADA’s membership. Each has an undeniable, unavoidable bottom-line financial and operational cost not only to the dealership, but very likely to all future *customers* of the dealerships as well. The prospect of the “procedural morass” envisioned by the Majority in *AT&T* can have nothing but deleterious effects upon dealerships’ ability to control costs, much less to simply *survive* in business. As retailers of the second most costly purchase that most consumers generally make (second only to their homes), motor vehicle dealerships are in a unique position not only in terms of exposure to liability, but also in terms of the size of “target” they constitute for the very kinds of “questionable” claims with which the holding in *AT&T*, among many other concerns, was addressed.

Additionally, *AT&T* observes that, if “faced with *inevitable* class arbitration, companies would have *less incentive* to continue resolving potentially duplicative claims on an individual basis.” Slip Op. at 13 (emphasis added). Such would be a likely, and logical, result when applied to Missouri motor vehicle dealers, particularly given the large volume of consumers with whom they interact and the basic similarity in the types of transactions executed at most dealerships. Such a disincentive to amicably resolve individual disputes is directly contrary to the goals of Congress in

enacting the FAA, as discussed in *AT&T*, and would undoubtedly result in greater delay and expense to both parties involved in the dispute.

Thus: Aside from contravening the objectives of the FAA, as articulated in *AT&T*, this Court's original opinion in this case placed small businesses, such as Missouri motor vehicle dealerships, in a very tenuous posture, by essentially "mandating" the availability of class arbitration, despite the absence of appellate protections that these businesses would otherwise have in traditional litigation. Therefore, both as a means of bringing Missouri law into compliance with the FAA, *and* as a means of protecting Missouri dealerships and their customers from the perils discussed in *AT&T*, *Amicus* MADA respectfully requests this Court to enter a new opinion in the instant case which is consistent with the rationale, and ultimate holding, reached in *AT&T*. Such an outcome is necessary from a policy perspective in order to avert the harms discussed above, and such an outcome is necessary from a *legal* perspective as well, because there is no material difference between the "rule" created in this Court's original holding in this case (and the facts on which it was based), and the *Discover Bank* rule that has now been rejected by the Supreme Court of the United States in *AT&T*.

#### **4. Issue of "Procedural" vs. "Substantive" Unconscionability Irrelevant**

Much attention was given by this Court, in its original majority opinion in this matter and in the dissenting opinions, to the question of whether both elements of

unconscionability (procedural and substantive) must be found in order to invalidate a contract or a contractual provision under Missouri law. While the majority holds that, under Missouri law, “unconscionability can be procedural, substantive, or a combination of both”<sup>4</sup>, and the dissenting opinions question this conclusion, the resolution of this question (i.e. whether one form of unconscionability is sufficient to invalidate, or whether both forms are required) is wholly unnecessary to this Court’s determination of this case in its current posture, following remand by the U.S. Supreme Court pursuant to its holding in *AT&T*. A thorough reading of *AT&T*, along with the relevant factors underlying the Supreme Court of California’s creation of the *Discover Bank* rule, reveals nothing in those opinions requiring any analysis of how unconscionability is determined in order to reach the ultimate conclusion that the *Discover Bank* rule (and hence, the original holding of this Court in this case) is preempted by the FAA and thus void of future application.<sup>5</sup>

Therefore, regardless of how this Court may ultimately decide that unconscionability must be determined, such determination has no bearing on the instant case.

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<sup>4</sup> *Brewer*, 323 S.W3d at 22.

<sup>5</sup> However, it is notable that California law appears to require a determination of both a “procedural” and a “substantive” element to support a finding of unconscionability. *See AT&T*, Slip Op. at 5.

WHEREFORE, for all of the aforesaid reasons, *Amicus* Missouri Automobile Dealers Association respectfully requests that this Court, following the vacating of its original decision in this case and on remand of this case from the Supreme Court of the United States in light of the latter's Opinion in *AT&T Mobility LLC v. Concepcion*, enter a new Opinion which is consistent with the holding and rationale in *AT&T* and which furthers the objectives of Congress via its passage of the Federal Arbitration Act; *Amicus* MADA further respectfully requests such other relief as may be just and proper in the circumstances.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that ten true and correct copies, plus one receipt copy, of the above and foregoing document, along with a diskette containing same, were hand delivered on this \_\_\_\_ day of June, 2011 to Mr. Bill Thompson, Interim Clerk, Missouri Supreme Court, 207 W. High Street, Jefferson City, MO 65101.

I hereby certify that a true and correct copy of the above and foregoing document, along with a diskette containing same, were sent via United States Mail on this \_\_\_\_ day of June, 2011 to each of the following:

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Rule 84.06 of the Missouri Rules of Civil Procedure, that this brief in the above-captioned case complies with the limitations in Rule 84.06(b); it was prepared using Microsoft Office Word 2003, in 13-point Times New Roman font; and it contains 2,802 words, as determined by the Microsoft Office Word 2003 word-counting system. I also certify that the diskettes of the brief filed with the Court and served upon all parties have been scanned for viruses and are virus-free.

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